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MICHAEL RODAK, JR., CLERK

No. 78-137

In the Supreme Court of the United States

OCTOBER TERM, 1978

MOODY AUBREY TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.,
*Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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Petitioner argues that his failure to report substantial amounts of gross receipts from the sale of livestock on his federal income tax returns did not constitute the offense of filing false tax returns in violation of 26 U.S.C. 7206(1).

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on three counts of filing false income tax returns for 1969, 1970 and 1972, in violation of 26 U.S.C. 7206(1). The trial court sentenced him to prison terms of two years on Counts 1 and 2, and three years on Count 3, to run concurrently. The court of appeals affirmed (Pet. App. B).

The evidence adduced at trial showed that petitioner was engaged in the cattle feeding business but had neither reported any gross receipts from the sale of livestock on his 1970 and 1971 income tax returns nor reported his income or expenses from his cattle enterprise on the prescribed Schedule F for those years. On his 1972 return, petitioner reported some, but not all, of his gross receipts from the sale of livestock and did file a Schedule F for that year. Moreover, petitioner failed to report partnership income and commissions for all three years (Pet. App. B, p. 3b).

In defense, petitioner testified that his unreported gross receipts from the sale of livestock were offset by unreported losses. He also testified that he did not know that he was required to report losses. Petitioner kept no systematic records of his cattle transactions; he relied instead upon mental calculations to determine that his losses exceeded profits (*ibid.*).

Petitioner argues (Pet. 4-5) that the Internal Revenue Code does not require him to report gross receipts from the sale of livestock, only gross income,¹ and that the government bears the burden of showing that petitioner actually had gross income from his livestock business.² But conviction of the offense of filing false returns under Section 7206(1) does not require proof of intent to evade

¹Treasury Regulations on Income Tax (1954 Code), §1.61-4(a) (26 C.F.R.) provides that gross income of farmers includes the profits from the sale of any livestock. The profit from the sale of livestock is computed by deducting the cost from the sales price.

²Petitioner asserts (Pet. 6) that the district court recognized this principle in its instructions to the jury, which provided as follows (Pet. App. B, p. 4b n. 5):

Let me advise you right here it is also the burden on the government to prove by—beyond a reasonable doubt that the receipts

payment of taxes or the existence of any taxable income. Rather, Section 7206(1) is a fraud statute that requires the government to show that the defendant willfully made and subscribed a return, that it contained a written declaration that it was made under penalties of perjury, and that the defendant did not believe it to be true and correct as to every material matter. The only question in this case was whether petitioner was required to report gross receipts from the sale of livestock in order to file a true and correct return within the meaning of the statute. As the court of appeals properly observed (Pet. App. B, p. 5b), a tax return that omits material items necessary to the computation of income is not true and correct within the meaning of Section 7206(1). *United States v. DiVarco*, 484 F. 2d 670, 673 (C.A. 7); *Siravo v. United States*, 377 F. 2d 469, 472 (C.A. 1).

Here, the amount of gross receipts from petitioner's sale of livestock was information necessary to determine his gross income. The evidence of unexplained gross receipts from the sale of livestock adduced by the government established a *prima facie* case of petitioner's filing a false return by failing to report gross income. This evidence shifted to petitioner the burden of coming forward with evidence as to the amount of offsetting expenses, if any. *United States v. Ballard*, 535 F. 2d 400, 405 (C.A. 8), certiorari denied, 429 U.S. 918; *Siravo v. United States*, *supra*, 377 F. 2d at 473-474; *United States v. Shavin*, 320

as shown by the evidence were income under the laws and regulations in this case.

To the extent that this instruction was erroneous, under its decision, the court of appeals held that it was harmless to petitioner (Pet. App. B, p. 4b n. 5).

F. 2d 308, 312 (C.A. 7), certiorari denied, 375 U.S. 944. Since petitioner did not come forward with any cogent evidence of expenses, he was properly convicted of filing a false return.

Petitioner also contends (Pet. 7-8) that Form 1040 does not require the reporting of gross receipts from the sale of livestock, and that Schedule F, which requires such reporting, is not a form prescribed by the Secretary or his delegate in duly promulgated regulations as is required by Section 6011. But it is implicit in Form 1040, which was required to be filed in this case, that Schedule F, when appropriate, becomes an integral part of Form 1040 and is incorporated therein by reference. Each Form 1040 filed by petitioner included lines reading "Farm income (or loss) (attach Schedule F)."³ As the court of appeals correctly noted (Pet. App. B, p. 7b), Section 7206(1) requires the same duty of honest reporting on Schedule F as is required for entries on Form 1040.

Finally, petitioner argues (Pet. 8) that in a prosecution under Section 7206(1), the government must show that there is a deficiency for the tax years in which a conviction was obtained. However, the courts have uniformly held that in a prosecution for filing a false income tax return, the government need not prove a tax deficiency. The crime is complete with the willful filing of a return which contains false information as to a material matter. *United States v. Johnson*, 558 F. 2d 744, 746 (C.A. 5), certiorari denied, No. 77-746, February 21, 1978; *United States v. Ballard*, *supra*, 535 F. 2d at 404; *United States v. DiVarco*, *supra*, 484 F. 2d at 673; *United States v. Null*, 415 F. 2d 1178 (C.A. 4).⁴

³Line 38 on the 1970 and 1971 return. Line 40 on the 1972 return.

⁴*Rinaldi v. United States*, 434 U.S. 22, upon which petitioner relies (Pet. 8-9), does not support his assertion that his prosecution violated

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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a purported Internal Revenue Service policy against prosecution under Section 7206(1) unless there is a tax deficiency. As the court of appeals noted (Pet. App. B, p. 8b), there is no such policy of the Internal Revenue Service or the Department of Justice. The existence of a tax deficiency is only one of several factors to be considered when recommending prosecution and is not a prerequisite to such a recommendation. Moreover, *Rinaldi* dealt with the Department of Justice's policy concerning dual federal-state prosecutions and has no application here.